1985

The State of Utah v. Allen F. Rice : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

1985

20651

THE STATE OF UTAH,	:	
		BRIEF OF APPELLANT
Plaintiff/Respondent,	:	
v.	:	
ALLEN F. RICE,		Case No. 20651
	:	
Defendant/Appellant.		

BRIEF OF APPELLANT

THIS IS AN APPEAL FROM A CONVICTION FOR THE OFFENSES OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, A MISDEMEANOR, AND UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE FOR VALUE, A FELONY, BOTH IN VIOLATION OF TITLE 58, CHAPTER 37, SECTION 8, UTAH CODE ANNOTATED, 1953 AS AMENDED, AND DRIVING ON SUSPENSION, A MISDEMEANOR, IN VIOLATION OF TITLE 41, CHAPTER 12, SECTION 32, UTAH CODE ANNOTATED, 1953 AS AMENDED, IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR CACHE COUNTY, STATE OF UTAH, THE HONORABLE VENOY CHRISTOPHERSON, JUDGE PRESIDING.

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v.	:	
ALLEN F. RICE, Defendant/Appellant.	:	Case No.

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction for the offenses of Unlawful Possession of a Controlled Substance, a misdemeanor, and Unlawful Possession of a Controlled Substance with Intent to Distribute for Value, a felony, both in violation of Title 58, Chapter 37, Section 8, Utah Code Annotated, 1953 as amended, and Driving on Suspension, a misdemeanor, in violation of Title 41, Chapter 12, Section 32, Utah Code Annotated, 1953 as amended, in the First Judicial District Court in and for Cache County, State of Utah, the Honorable Venoy Christopherson, Judge presiding.

DISPOSITION IN THE LOWER COURT

Appellant, Allen F. Rice, was charged by Information with the offenses of Unlawful Possession of a Controlled Substance with Intent to Distribute for Value, a felony, Unlawful Possession of a Controlled Substance, a misdemeanor, both in violation of Utah Code Annotated, §58-37-8 (1953 as amended) and Driving on Suspension, a misdemeanor, in violation of Utah Code Annotated, §41-12-32 (1953 as amended). The case was

tried to a jury, on April 16, 17, 18 and 19, 1985. Appellant was convicted of all the offenses, as charged in the Information. On May 6, 1985, appellant was ordered to serve an indeterminate sentence of not more than fifteen years in the Utah State Prison for the felony conviction and serve 30 days in jail for the offense of Unlawful Possession of a Controlled Substance and pay a $150 fine for the offense of Driving on Suspension.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order from this court suppressing certain evidence, reversing the judgments and convictions rendered against him for the charges of Unlawful Possession of a Controlled Substance and Unlawful Possession of a Controlled Substance with Intent to Distribute for Value, and remanding the case to the First District Court for a new trial. In the alternative, appellant seeks to have the judgment and conviction for the offense of Unlawful Possession of a Controlled Substance with Intent to Distribute for Value reversed and a judgment of acquittal ordered.

ISSUES PRESENTED FOR REVIEW

The issues raised in this appeal are: Whether law enforcement officers violated appellant's constitutional right against unreasonable searches and seizures by searching his vehicle?; and whether the evidence was sufficient to establish the element of the intent to distribute for value in the offense

of unlawful possession of a controlled substance with intent to distribute for value?

STATEMENT OF THE FACTS

Appellant, Allen F. Rice, was the subject of an ongoing narcotics investigation instituted by Cache County Sheriff's detectives. (Tr. at Suppression Hearing at 76)[1] As a result of this investigation the detectives in charge of the case had learned that: appellant lived in Salt Lake City, his driver's license had been suspended for failure to prove financial responsibility, and he regularly visited his parents in Logan on Wednesdays. (Tr. P. 79, Tr. S. 6, 34, 54) On Wednesday, December 7, 1984, as part of this investigation, Sergeant Sid Groll and Detective Brad Blair were conducting surveillance in Logan City, near appellant's parent's home. The primary reason they were in that area was to see if appellant was in the Cache Valley. (Tr. P. 78, Tr. S. 79)

While having a drink at a service station the detectives observed appellant drive by in his truck. They decided to stop him for the offense of driving on a suspended or revoked driver's license. (Tr. P. 79, Tr. S. 14) By making such a stop, the detectives hoped to further their investigation by meeting

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1. Transcripts of three separate proceedings have been made part of the record on appeal: the trial, the suppression hearing and the preliminary hearing. These transcripts had not been numbered consecutively, so for the purposes of this brief appellant has designated the transcripts in the following manner: Transcript of Preliminary Hearing: Tr. P.; Transcript of Suppression Hearing: Tr. S.; Transcript of trial: Tr.;

appellant face to face. (Tr. S. 16) They also stated that there was a possibility that contraband may be found. (Tr. S. 29, 80)

The detectives, who were driving an unmarked car, signaled appellant to pull over. He then pulled into a parking lot behind a law office in Logan. (Tr. P. 81, Tr. S. 14, 48, Tr. 103) Appellant was informed that he was being arrested for driving on suspension, at which time he requested that he be allowed to leave the vehicle at his mother's house. (Tr.S. 31, 56) When that request was denied appellant then asked if he could lock his luggage in the cab of the truck and leave it in the parking lot. (Tr. S. 56) Sergeant Groll denied those requests and gave appellant only two options: to allow one of the detectives to drive the truck to the Sheriff's office, or to have the truck searched and towed from the parking lot. (Tr. P. 64, 69, Tr. S. 56, Tr. 105) The appellant opted to allow Sergeant Groll to drive the vehicle to the Sheriff's department. (Tr.P. 60, Tr.S. 31, Tr. 105)

At the Sheriff's office the detective consulted with patrol officers to determine what procedure to follow in impound searches and to obtain the proper forms to conduct the search. (Tr. S. 83, Tr. 110) Sergeant Groll justified his need to conduct an inventory of the vehicle because he had driven the vehicle and did not want to be the victim of a theft claim. (Tr. P. 59, 85, Tr. 110) Appellant was not informed of the necessity of such a search until it had been completed. (Tr. P. 59) During the course of the inventory the detectives found

four ounces of cocaine in a paper bag inside the truck, a vile containing cocaine and a canister of marijuana in a camera case in the truck along with assorted depressant-type pharmacutical drugs in a suitcase. (Tr. 112)

At trial witnesses for the State testified that based on the quantity, quality and packaging of the cocaine, it appeared that appellant was intending to distribute it to others. (Tr. 303-306, 332, 533-535) Defense witnesses offered testimony to the contrary indicating that in this case, the method of packaging and the location of the drugs were insignificant, and that the quantity was consistent with the amount that may be possessed by a "heavy" cocaine user. (Tr. 372-375, 471-477)

SUMMARY OF ARGUMENT

The inventory of appellant's vehicle was conducted as a pretext to the detectives' ongoing narcotics investigation and not to further any of the policies that courts have found to be reasonable grounds for upholding inventory searches. Likewise, the refusal by detectives to allow appellant to either leave his vehicle at the scene of the arrest or turn it over to a third person makes any subsequent inventory or search of that vehicle unreasonable. The second issue raised on appeal is that there was insufficient evidence presented by the state to establish the element of intent to distribute for value.

ARGUMENT

POINT I

THE INVENTORY OF APPELLANT'S VEHICLE VIOLATED HIS CONSTITUTIONAL PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES AS IT WAS A PRETEXT TO AN INVESTIGATORY SEARCH. FURTHERMORE, PROPER PROCEDURES WERE NOT FOLLOWED IN TAKING CUSTODY OF THE VEHICLE WHICH ALSO MADE THE SEARCH UNREASONABLE.

Prior to trial, appellant filed a motion to suppress evidence seized during the course of the inventory search of his vehicle. (R. 17) An evidentiary hearing was held and the motion was denied in a written opinion issued by the trial court. (R. 110-114) The motion was reviewed at trial and objections were made to the introduction of the evidence seized as required by State v. Leslie, 672 P.2d 79 (Ut. 1983). (Tr. 4, 337)

In its rulings on the Fourth Amendment to the United States Constitution, the United States Supreme Court has established two requirements that must be met before the fruits of a search may be used against a defendant: (1) the search must be reasonable; and (2) the search must be made pursuant to a valid warrant. Coolidge v. New Hampshire, 403 U.S. 443 (1971). If there is no warrant, there are specific exceptions in which the Court has allowed warrantless searches to be conducted.[2] The exception relied upon by the State in this case is that of an inventory search of a vehicle. South Dakota v. Opperman, 428 U.S. 364, (1976).

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2. This court has established the same requirements for Article I, Section 14 of the Constitution of Utah, State v. Hygh, 16 U.A.R. 10 (Ut. 1985).

The important aspect of all of the exceptions to the warrant requirement of the Fourth Amendment is that the scope of any warrantless search is to be limited by the policies that justify it. The justification that the court gave in Opperman for the inventory search of a vehicle were four fold: (1) to determine if the automobile is stolen; (2) to protect the police from potential danger; (3) to protect the owner's property from theft or vandalism; and (4) to protect the police against claims for lost or stolen property. In upholding the inventory in Opperman the Court described two prerequisites that must be met: First the search must be made pursuant to standardized procedures. Secondly, the search must not be a pretext of an investigatory search.[3]

A

THE INVENTORY IN THIS CASE WAS A PRETEXT TO AN INVESTIGATORY SEARCH.

The threshold issue in this case is whether this inventory search was really a pretext to the ongoing narcotics investigation. In making this determination, the courts look to the totality of all the circumstances of the arrest and search. The factors that the courts have found to be important are: whether the arrestee was a suspect in a different offense or investigation; whether standard procedures were followed during the course of the search; and the location of the vehicle

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3. These same requirements have been placed on vehicle inventories conducted under Article I, Section 14 of the Constitution of Utah, State v. Hygh, supra.

at the time the search was conducted.[4]

In State v. Stockert, 245 NW2d 266 (N.D. 1976), the court found the inventory search of the defendant's vehicle, after an arrest for a traffic violation, was a pretext to a narcotics investigation. In that case, the arrest and search were not conducted by patrolmen but, as in this case, by narcotics officers. Blazak v. Eyman, 399 F.Supp. 40 (D.C. Ariz. 1971), involved a situation where the police received an anonymous tip that the defendant was smoking marijuana. The officers, before leaving the station, received a teletyped message that the defendant's driver's license had been suspended. The defendant was arrested for driving on suspension, his car was searched and marijuana was found. The court rejected the state's claim that this was a search incident to arrest and found that the traffic arrest was a pretext to search the vehicle to further the narcotics investigation. A major factor in the court's decision was that the defendant was never charged with the alleged traffic violation. Likewise, in State v. Phifer, 254 S.E.2d 586 (NC 1979), the defendant was stopped for speeding. A second officer arrived on the scene and informed the first officer that the defendant was a known drug dealer. A warrant check was conducted and outstanding warrants for other traffic offenses were discovered. The court found that the officer's decision to request a warrant check followed by

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4. See generally, LeFave, Search and Seizure, A Treatise on the Fourth Amendment, 1978 §7.5(e).

his unilateral decision to impound the car, after learning that the defendant was a drug dealer, indicated that the inventory was a pretext to search the defendant's car for contraband.

In the instant case, detective Blair testified that over the last four and one half years he had been a detective involved in follow-up investigations of criminal offenses other than traffic offenses. He had not been assigned to duty as a traffic patrolman in that period of time. (Tr.S. 4) Blair also stated that he and Sergeant Groll were specifically looking for appellant and his truck on that evening. (Tr.S. 8-9) He then described their reasons for stopping appellant:

> A. I had no knowledge that he'd have drugs and stuff with him, but I knew that there could have been a possibility. From what I'd heard there could have been a possibility he did have that. [Emphasis added]
>
> Q. On that very night?
>
> A. Yes.
>
> Q. And it's also true, Mr. Blair, that this is part of the reason you pulled him over?
>
> A. Part of the reason, yes.
> (Tr.S. 17)

As described by Sergeant Groll, the detectives had, for several weeks, been formulating a plan to stop appellant for driving on suspension as part of their narcotics investigation:

> Q. Had you on any occasion prior to stopping Mr. Rice discussed the option of stopping him for driving on suspension?

A. Yes.

Q. When would that have been?

A. Probably two to four weeks prior to that night.

Q. And with whom was that discussion?

A. It was discussed with Detective Blair.

Q. Was Mr. Rice a subject of investigation by the Cache County Sheriff's Office on December 7, at least as of that date?

A. Yes, sir, he was.
(Tr.S. 66)

The detective admitted that other options of obtaining a search warrant or making a controlled narcotics buy were considered. (Tr.S. 67-68) However, a buy could not be made and the detective admitted that they lacked sufficient information to obtain a search warrant. (Tr.S. 68)

With respect to the effectuation of this plan, Detective Blair testified:

Q. And that night as you saw him drive by there was an opportunity to put that plan or scenario into effect; is that true?

A. Yes.

Q. You expected him in town that night because it was his habit, as far as you knew, to come into town every Thursday night, if that was a Thursday. Wednesday?

A. Wednesday.

Q. Wednesday night. I'm a day behind.

A. Yes.

Q. You knew it was his habit to come into town about every Wednesday night?

A. Yes.
(Tr.S. 19)

These admissions of the existence of a plan to stop appellant to further the narcotics investigation were also expressed by Detective Blair.

Q. Are you telling this court, Mr. Blair, that your intention of pulling him over was simply to cite him for driving on suspension? Is that your testimony?

A. No, it's not.

Q. All right. You pulled him over for far more than that, didn't you?

A. To meet him.

Q. Was he a suspected drug dealer; right?

A. Yes.

Q. You pulled him over to meet him?

A. Yes.
(Tr.S. 15)

This stop was a pretext to conduct further investigation on appellant by searching his vehicle. In addition to the detectives' statements that they hoped to find narcotics, the circumstances surrounding the seizure of the vehicle corroborate the conclusion that the inventory search was actually a pretext to search for narcotics. Appellant had pulled his vehicle into a parking lot when the detectives signaled him to pull over. (Tr.P. 81, Tr.S. 14, 48, Tr. 103) After being placed under arrest he requested the officers either to lock the vehicle and leave it at the parking lot or to turn it over to his parents.

(Tr.S. 31, 56) Sergeant Groll denied both requests. He gave appellant the option of having the vehicle inventoried and towed from the parking lot or allowing Groll to drive it to the Sheriff's office. (Tr.P. 64, 69. Tr.S. 56) After driving the vehicle to the Sheriff's office, Groll then justified the inventory of the vehicle by claiming that it was necessary to protect himself against false claims of theft. (Tr.P. 59, 85, Tr. 110) Essentially, the only choice that the detectives gave appellant was to have his vehicle searched under the guise of an inventory.

These circumstances and admissions by the detectives demonstrate that the search of appellant's vehicle was not a legitimate exercise of the caretaking required of law officers after they make a traffic arrest. Rather, it was a pretext to search appellant's vehicle to further their narcotics investigation. This is especially obvious in light of the fact that the detectives had been aware of appellant's suspended license for several weeks but had chosen not to arrest him on previous occasions for that offense. Thus, the search violated the appellant's right against warrantless and unreasonable searches and seizures as provided in the Fourth and Fourteenth Amendments to the United States Constitution and Section 14 of the Constitution of Utah. Consequently, the evidence seized as a result of that search must be ordered to be suppressed.

B

THE DETECTIVES IMPROPERLY REFUSED TO FOLLOW THE APPELLANT'S REQUEST REGARDING THE DISPOSITION OF HIS VEHICLE, THUS MAKING THE IMPOUND IMPROPER.

The officer's purported justification for the inventory search in the instant case was to protect appellant against theft or loss and to protect themselves against false claims of theft. This has generally been referred to as the "caretaking" function of the inventory search. In Opperman, the vehicle in question had been parked on the street and had been given numerous parking violations. Valuables had also been left in plain sight in the car. The owner was neither available to dispose of the car which was illegally parked nor was he present at the time of impound.

The United States Supreme Court, nor this Court have specifically addressed the issue of how to properly dispose of an impounded automobile when the owner is present. In State v. Hygh, supra, this court held that the failure to follow departmental policies regarding advising a vehicle owner of impound procedures taken in conjunction with other circumstances of the arrest and search, constituted a pretext for an investigative search. Before law enforcement officers may claim that there is a valid impound, this court held that there must be a reasonable and proper justification stating:

> [I]n order to support a finding that a valid inventory search has taken place, the court must first determine whether there was reasonable and proper justification for the impoundment of the vehicle. This justification and thus lawful impoundment, can be had either through explicit statutory authorization or by the circumstances surrounding the initial stop. If impoundment was "neither" authorized nor necessary, the search was unreasonable.

> Utah's statutes give a police department authority to impound vehicles in several situations. Vehicles may lawfully be impounded when they are used to transport controlled substances, U.C.A 1953, §58-37-13; when the vehicle is improperly registered or stolen, U.C.A. 1953, §41-1-115; or when a vehicle is abandoned, U.C.A. 1953, §41-116.10. No specific statutory authority exists authorizing impound of a vehicle stopped and parked on the street after the driver has been arrested. Therefore, we must look to the circumstances surrounding the stop to determine whether the impound was reasonable.
>
> It is the burden of the State to establish the necessity for the taking and the inventory of the vehicle. [Footnotes ommitted] 16 UAR at 12.

In Hygh the Salt Lake City Police Department had previously issued a departmental order to establish impound procedures when the owner of the vehicle was present. With respect to inventory searches conducted when the vehicle owner is present, this court stated:

> [W]e are not prepared to say that a true inventory search cannot be made in the presence of the vehicle's owner and without his consent. However, if the purpose of the search is truly only to inventory the contents of the vehicle and to safeguard them during impoundment, an indicia that such is the real purpose of the search is to consult with the owner of the vehicle when he is present at the time of the impound and the search. [Footnote ommitted] 16 UAR at 12-13.

Other courts have addressed this issue and have held, generally, when the owner of the vehicle is available to make arrangements for the care and custody of his vehicle after an arrest for a traffic offense an impoundment and inventory of the vehicle is not appropriate. In State v. Bales, 15 Wash.

App. 834, 552 P.2d 688 (1976), the court specifically held that following an arrest on a traffic charge, impoundment of the vehicle is inappropriate when reasonable alternatives exist. In that case the defendant had requested that the arresting officers call a friend to pick up the car, but they did not do so. Likewise, in Arrington v. United States, 382 A.2d 14 (D.C. App. 1978), the defendant was stopped next to a parked car and was directed to move his car around the corner. The police moved the car to the police station after finding that the defendant's license had been suspended. The court held that the police are authorized to impound a vehicle only if the defendant consents or he is incapable of making other arrangements its disposition.

State v. LaRue, 368 So.2d 1048 (1979), involved a situation wherein the defendant was arrested for driving under the influence. At the scene of the arrest, his automobile was searched. Among the factors that the court found that indicated that this was not a proper inventory was the fact that the defendant was not asked if there were valuables in the vehicle or if he could make arrangements to have someone pick up the vehicle. Finally, in United States v. Pappas, 735 F.2d 1232 (10th Cir. 1984), officers for the Price City, Utah, police department responded to a complaint of an assault with a firearm. The officers stopped the defendant and made a limited search of his vehicle in a private parking lot. A firearm was located. The defendant was placed under arrest and his vehicle was impounded. During an impound search a sawed-off shotgun was

found. The trial court held that the impound and subsequent search of the defendant's vehicle violated his rights under the Fourth Amendment. The court noted that the defendant should have been given the opportunity to make other arrangements for the care and custody of the vehicle. The court stated:

> The trial court correctly held that Opperman cannot be used to justify the automatic inventory of every car upon the arrest of its owner. The justifications for the rule are too carefully crafted for this to be the intent. 732 F.2d at 1234.

In the instant case, Detective Blair testified that appellant made several different requests for the disposition of the vehicle. He testified:

> Q. I see. Now, were you present during the discussion at the scene of the arrest where Mr. Rice asked if he could just lock the vehicle and leave it there behind the law office in the parking lot? Did that discussion take place?
>
> A. I believe so.
>
> Q. Okay. You heard it?
>
> A. Yes.
>
> Q. And in response to that question by Mr. Rice you or Mr. Groll instructed him that you couldn't leave it there and it had to be taken in to the police station; right?
>
> A. No, I don't believe that was the conversation.
>
> Q. But that it couldn't be left there?
>
> A. I believe Sid said, "That's not one of the choices."
>
> Q. "That's not one of the choices"?
>
> A. Yeah.

> Q. What other choices did he give him?
>
> A. I believe he said he could have a wrecker come and impound it or if he'd like, Allen would like Sid to drive it to the Sheriff's Office, and Allen said, "Yes, you can drive it."
>
> Allen asked if he could leave it at his mother's place, and Sid said, "No, that's not one of the"...
>
> Q. "That's not one of the choices"?
>
> A. Yeah, choices.
> (Tr.S. 30-31)

Although the issue in this case is slightly different than that in Hygh, the legal principle that governs is the same. In Hygh the officer failed to follow departmental procedures, whereas, in the instant case, appellant requested that his vehicle be left in the custody of his mother or at the parking lot where he was stopped. (Tr.S. 31, 56) The detectives later testified that the area may not have been a safe place to leave the vehicle (Tr.P. 69, Tr.S. 64), but obviously appellant was willing to take that risk. Appellant's parents lived in Logan City and appellant lived there for a number of years, (Tr.S. 6, 53) so this is not a case where he was not aware of the circumstances and risks in leaving the vehicle in the lot. This is reinforced by the fact that his parents lived only several blocks away. (Tr.S. 23) It would be safe to assume that the vehicle would be moved from the lot within a matter of minutes. Here, appellant was given only alternatives which would result in an inventory of the vehicle. When these facts are considered in conjunction with all of the other facts and circumstances

surrounding the arrest, the evidence indicates that the impound was neither reasonable nor necessary to protect appellant's property or protect the detectives from false claims of theft. Since the justifications for an inventory search of appellant's vehicle are not applicable to this case, the search cannot be justified as a legitimate impound, State v. Hygh, supra. The seizure of the contraband was made in violation of his rights as guaranteed in the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Constitution of Utah. Consequently, the evidence seized should be ordered suppressed.

C

THE USE OF THE EVIDENCE UNLAWFULLY SEIZED FROM APPELLANT WAS PREJUDICIAL, THUS REQUIRING A NEW TRIAL.

Appellant was charged in an Information with three counts: Count I, Unlawful Possession of a Controlled Substance with Intent to Distribute for Value; Count II, Unlawful Possession of a Controlled Substance; and Count III, Driving on Suspension. (R. 1) The substance that was alleged to be possessed in Count I was four ounces of cocaine and in Count II was a small container of marijuana. Both items were discovered in the search of the vehicle. Without these substances there is no evidence to support these two charges. Consequently, the introduction of the evidence at trial was prejudicial. The case should be remanded to the district court for a new trial with an order prohibiting the use of the evidence which was

illegally seized.

POINT II

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE APPELLANT POSSESSED COCAINE WITH THE INTENT TO DISTRIBUTE FOR VALUE.

The standard by which this court reviews a criminal conviction to determine if the evidence is sufficient to sustain that conviction has been described in a number of cases. Recently, in State v. Petree, 659 P.2d 443 (Ut. 1983), the court held,

> In considering that question, we review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted. 659 P.2d at 444.

The court then went on to note the evidence must do more than raise a mere speculation as to the defendant's guilt:

> ...we deem it desirable to emphasize that notwithstanding the presumptions in favor of the jury's decision this Court still has the right to review the sufficiency of the evidence to support the verdict. The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidenctiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict. The evidence, stretched to its utmost limits, must be sufficient to prove the defendant

guilty beyond a reasonable doubt. 659 P.2d at 444-445.

Utah Code Annotated, §58-37-8(a)(ii) (1953 as amended) makes the critical element of a felonious possession of a controlled substance the intent to distribute for value. This intent requirement is the only element that distinguishes the felony possession offense from a misdemeanor, unlawful possession of a controlled substance.[5]

As proof of this element, the State, in the instant case, introduced the cocaine itself and opinion evidence of three people: the arresting detective, the technical services officer from Logan City and a State narcotics investigator. Each of those three offered the opinion that the appellant's possession of the four ounces of cocaine was consistent with the amounts that would be held by a "dealer". (Tr. 221, 332, 535) These individuals based their opinions on the quality of the cocaine involved,[6] the nature of the packaging and the location of the package in appellant's vehicle. (Tr. 221, 372-375, 471-477) They had substantial disagreement about the actual value of the cocaine. Sergeant Groll testified that each package could be valued at $2,000 to $2,500 (Tr. 267) and the four packages together had a value of $15,000. (Tr. 270) He also indicated that he was never aware of this quantity

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5. The legislature has amended the penalties for unlawful possession of cocaine to make that offense a third degree felony. See Utah Code Annotated, §58-37-8(2)(b)(i) (1953 as amended).

6. Kent Glanville tested the four packages to contain 86% to 94% cocaine by weight.

being held for personal use. (Tr. 270) Agent Ron Flinders of the State Narcotics and Liqour Law Enforcement indicated that each of the four packages carried a value of $1,800 to $2,000 each. (Tr. 525) He felt the group of four packages had a value of $4,000 to $5,000, as the price per unit goes up with smaller quantities. (Tr. 543)

The defense introduced expert testimony which indicated that an extremely "heavy" cocaine user could consume more than ten grams of cocaine daily. (Tr. 376, 470) It was further shown that individuals who "free base"[7] cocaine would consume even more than that.[8] (Tr. 470-471) Sergeant Groll was not familiar with the practice of "free basing", (Tr. 235) and Agent Flinders felt that since "free basing" was generally done in the house and since appellant was arrested in his vehicle without "free basing" paraphelnalia he did not consider that type use with respect to his opinion on appellant intent. (Tr. 548) However, both defense experts indicated that it would be consistent with "heavy" cocaine use to possess the amount held by appellant at the time of his arrest. Such people would possess that quantity for personal use rather than for sales. (Tr. 379, 471)

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7. Dr. Michael DeCaria described "free basing" as a process where the user submits cocaine hydrochloride to a chemical reaction which releases the hydrochloride ion from cocaine hydrochloride leaving the "free base" cocaine which is then smoked. (Tr. 465-467)

8. Dr. DeCaria testified that theoretically a human could consume up to 40 grams of cocaine per day. (Tr. 469)

Based on this conflicting testimony, the evidence introduced on appellant's intent was so inherently improbable that reasonable minds must entertain a reasonable doubt that appellant committed the offense of unlawful possession of a controlled substance with intent to distribute for value. Consequently, the judgment and conviction for that offense must be reversed and the case remanded to the district court with an order to enter a judgment of acquittal.

CONCLUSION

The circumstances of appellant's arrest and the procedures followed in the seizure of appellant's vehicle indicate that the inventory of the vehicle was a pretext to search that vehicle to further a narcotics investigation. The search of the vehicle cannot be justified as a lawful impound. The evidence seized should therefore be suppressed and a new trial ordered. Due to the conflicting testimony on the issue of appellant's intent, the evidence was insufficient to establish the offense of unlawful possession of a controlled substance with the intent to distribute for value. Thus, in the alternative, appellant respectfully requests an order requiring the district court to enter a judgment of acquittal.

Dated this ____ day of December, 1985.

RONALD J. YENGICH

G. FRED METOS

CERTIFICATE OF DELIVERY

I hereby certify that four true and correct copies of the foregoing Brief of Appellant were mailed/deliverd to the Attorney General's Office, at 236 State Capitol Building, Salt Lake City, Utah, 84114, on this ____ day of December, 1985.

_____

ADDENDUM

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF UTAH

Sec. 14. [Unreasonable searches forbidden - Issuance of warrant]. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

UTAH CODE ANNOTATED, 1953 (as amended)

41-1-115, Seizure of vehicles stolen, improperly registered. The department or any peace officer, without a warrant, may seize and take possession of any vehicle which is being operated with improper registration, or which the department or the peace officer has reason to believe has been stolen, or on which any motor number, manufacturer's number or identification mark has been defaced, altered or obliterated. Any peace officer so seizing or taking possession of such vehicle shall immediately notify the department of such action and shall hold the vehicle until notified by the department as to what further action should be taken regarding the disposition of the vehicle.

ADDENDUM continued

UTAH CODE ANNOTATED, 1953 (as amended)

41-12-32, Crimes and penalties . Failure to report accident . False reports . Forged or unauthorized evidence or proof of financial responsibility . Driving after suspension or revocation of license or registration, or nonresident's operating privilege.

(c) Any person whose license or registration or nonresident's operating privilege has been suspended or revoked under this act and who, during such suspension or revocation drives any motor vehicle upon any highway or knowingly permits any motor vehicle owned by such person to be operated by another upon any highway, except as permitted under this act, shall be fined not more than $299 or imprisoned not exceeding six months, or both.

58-37-8. Prohibited acts - Penalties.
(1) Prohibited acts A - Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person knowingly and intentionally:

* * *

(ii) to distribute for value or possess with intent to distribute for value a controlled or counterfeit substance;

* * *

(b) Any person who violates Subsection (1)(a) with respect to:

(i) a substance classified in Schedules I or II is, upon conviction, guilty of a second degree felony and upon a second or subsequent conviction of any provision of Subsection (1)(a) is guilty of a first degree felony;

(2) Prohibited acts B - Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained pursuant to a valid prescription or order or directly from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this subsection;

* * *

ADDENDUM continued

UTAH CODE ANNOTATED, 1953 (as amended)

58-37-8 continued

(b) Any person who violates Subsection (2)(a)(i) with respect to:

(i) a substance classified in Schedule I and II, or marihuana, is, upon conviction, guilty of a third degree felony, except that if the amount of marihuana is over one ounce but less than 16 ounces, that person is guilty of a class A misdemeanor. Upon a second or subsequent conviction of possession of any controlled substance by a person having previously been convicted pursuant to the provisions of this Subsection (2)(b)(i), that person shall be sentenced to one degree greater penalty than provided in this Subsection (2)(b)(i);

(ii) all other controlled substances not included in Subsection (2)(b)(i), including less than one ounce of marihuana is, upon conviction, guilty of a class B misdemeanor, and upon a second conviction for possession of a controlled substance as provided in this Subsection (2)(b)(ii) is guilty of a class A misdemeanor, or upon a third or subsequent conviction is guilty of a third degree felony.

58-37-13. Property subject to forfeiture - Seizure - Procedure.

(1) The following shall be subject to forfeiture and no property right shall exist in them:

* * *

(e) All conveyances including aircraft, vehicles or vessels used or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession, or concealment of property described in (1)(a) or (1)(b) of this section, except that:

(i) No conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under this section unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to violation of this act; and

(ii) No conveyance shall be forfeited under this section by reason of any act or omission established by the owner to have been committed or omitted without his knowledge or consent; and

ADDENDUM continued

UTAH CODE ANNOTATED, 1953 (as amended)

58-37-13 continued

(iii) Any forfeiture of a conveyance subject to a bona fide security interest shall be subject to the interest of the secured party upon the party's showing he could not have known in the exercise of reasonable diligence that a violation would take place in the use of the conveyance.

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

STATE OF UTAH, Plaintiff vs. ALLEN F. RICE, Defendant	)	MEMORANDUM DECISION Criminal No. 3057

The defendant has filed a Motion to Suppress Evidence obtained in an inventory search of an automobile and seeks to suppress on the basis this was a pretext search only.

The defendant has filed also a motion for release of property namely a pistol and $2400.00 in case. Also a motion to discover and inspect. Since there was no opposition response filed to this Motion it will be granted and the order signed.

It is not denied that the defendant was the subject of an ongoing investigation in regard to the sale of controlled substances and at the time of this instance was observed by the officers driving a pickup truck. The officers had prior knowledge the defendant's drivers license was suspended and arrested him for driving on suspension. The defendant had pulled off into a deserted parking lot at night with very little lighting, as all business at that location had closed.

The defendant expressed concern for some property he had in the back of this truck in the form of boxes or suitcases and asked they be locked in the cab.

The officers then made the decision the car should be impounded

Number 3057-26

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as it was in a high risk location with property of the defendant to be protected. There was discussions as to whether the car should be towed to the police station or taken to the defendant's parents place, about an equal distance as the police station. The officers told the defendant they would not take the truck to his parents or allow him to drive the car as this would allow him to commit another crime since he was on suspension.

The result was that the defendant elected to let one of the officers drive his truck to the station while he rode in the police car with the other officer.

Both sides cite and rely on South Dakota v. Opperman, 428 U.S. 364, 49 F.2nd 1000, a 1976 case. Opperman notes their basis for allowing an inventory search was one: to protect the owners property in police custody; two: to protect the police against claims of lost or stolen property; three: to protect the police from potential danger.

It does not appear the police were in any danger, but it does appear there was valuable property of the defendant to be protected in a high risk area, that the defendant had expressed concerns about this property being protected. It appears the officers acted reasonable to protect the defendant's property.

Also, since the officer drives the car by himself to the station, the property was in his sole possession from where the defendant was stopped. It appears that since the defendant had expressed concern about his property and the car being in possession of the officer for this period of time, it would not seem unreasonable that he would request an inventory search to avoid accusations of missing or damaged property.

Defendant further urges that after a review of police arrests for suspension, revocation or financial responsibility that this defendant was picked on as far as being taken into custody. On the record for arrests on suspensions in the Cache County Sheriff's Office, on Page 8 of that report it shows that custody for such driving was 81% in 1982, 80% in 1983, and 91% in 1984. This would certainly not indicate that the defendant was an exception to being a custodial arrest as opposed to those just being given a ticket.

It appears to this Court that under the facts and circumstances the custodial arrest as well as the inventory search was reasonable. The Constitution only protects the defendant from unreasonable searches and under the circumstances just related the Court feels this not to be an unreasonable search. Simply the fact that the defendant happened to be a person who was the subject of an ongoing investigation concerning drugs should not prevent the officers from proceeding with an arrest where the law is violated and an inventory search where there seems to be a valid interest in protecting the defendant's property as well as protecting the police interest against false accusations.

Therefore, the Motion to Suppress is denied.

As to the Motion to Release the gun and money, the Court feels this is a premature motion if it turns out after foundations being made that this is not proper evidence, the motion might then be a proper one, but at this point this is still a controverted fact situation as to whether this is appropriate evidence.

Therefore, this motion will be denied. Counsel for State to prepare the appropriate order.

Dated this 31st day of October 1984.

BOOK 57 PAGE 251 BY THE COURT

Copy of the above mailed to
F, Lanny Gunnell, 160 No. Main, Logan, Utah 84321
Ronald J, Yengich, 72 E, 400 So., #355, SLC, UT 84111 &
Gordon J, Low
175 East 1st North
Logan, Utah 84321

This 2nd day of November 17 84
SETH S. ALLEN, Clerk
By Deputy Adell Kapfer